TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 235.

SALT LAKE CITY, APPELLANT,

vs.

O. J. HOLLISTER, COLLECTOR OF INTERNAL REVENUE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED JUNE 19, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a In the Supreme Court of the Territory of Utah, County of Salt Lake.

SALT LAKE CITY, Appellant, *vs.* O. J. HOLLISTER, Respondent.

Sheeks & Rawlins, attorneys for plaintiff. P. T. Van Zile, attorney for defendant.

Due service of a copy of within admitted, this 29th May, 1882.

P. T. VAN ZILE,
Att'y for Respondents.

Filed May 31, 1882.

E. T. SPRAGUE,
Clerk of Supreme Court, Utah, T'y.

1 In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

SALT LAKE CITY, Plaintiff *vs.* O. J. HOLLISTER, Defendant.

Complaint.

Said plaintiff complains of said defendant, and for cause of action alleges:

That said plaintiff is a public municipal corporation, created and organized under and by virtue of the laws of the Territory of Utah, and has continuously existed as such since the 20th day of February, A. D. 1850.

That said defendant was at the times hereinafter mentioned, and still is, the acting United States collector of internal revenue for the district of Utah.

2 That heretofore, to wit, in June, A. D. 1876, the United States Commissioner of Internal Revenue erroneously and illegally set down to and assessed against said plaintiff a special tax of ten thousand seven hundred and sixty dollars, upon spirits alleged to have been distilled by said plaintiff at various times between the 2d day of March, A. D. 1867, and the 26th day of August, A. D. 1868, and not deposited in the bonded warehouse of the United States by said plaintiff, as required by law, and upon no other account or species of property whatever.

That afterwards the list containing said tax so set down and assessed as aforesaid was, by the said Commissioner of Internal Revenue, placed in the possession of said defendant, as such collector aforesaid, for the collection thereof.

That thereupon said defendant, as such collector of internal revenue aforesaid, then and there, well knowing that the said special tax so as aforesaid assessed against said plaintiff by the said Commissioner of Internal Revenue was erroneous and illegal, and was made upon and on account of spirits alleged to have been distilled as aforesaid by said plaintiff, and on no other account or species of property whatever, proceeded to and did demand the payment of said special tax assessed as aforesaid from said plaintiff to said defend-

ant, and then and there threatened that unless the payment of said special tax be made as demanded as aforesaid, said defendant, as such collector of internal revenue, would seize upon, and sell at public auction, sufficient of the property of said plaintiff to pay the said special tax, with interest and penalty for non-payment of taxes upon demand added thereto.

That on the 14th day of August, A. D. 1877, and while said defendant so threatened and was about to seize upon and sell the property of said plaintiff as aforesaid, and so deprive said plaintiff of the possession and use thereof, said plaintiff, to prevent the seizure and sale of said property as aforesaid, and in order not to be dispossessed of the same by said defendant, was compelled to and did pay to said defendant the amount of said special, with the interest which had accrued thereon from the date of said assessment, then
3 and there first protesting against the said payment thereof, and notifying said defendandant that suit would be commenced against him to recover the same.

That the amount so paid by said plaintiff to said defendant was twelve thousand and fifty-one dollars and seventy-five cents ($12,051.75).

That thereafter, to wit, on the 29th day of August, A. D. 1877, said plaintiff appealed to the said Commissioner of Internal Revenue praying therein that he cause the assessment of said special tax so made as aforesaid by him against said plaintiff to be abated, and the said sum so paid to said defendant, with interest thereon, to be refunded to said plaintiff. But said plaintiff alleges that the said Commissioner of Internal Revenue has failed and neglected to render any decision on said appeal, or to cause said sum and interest, or any part thereof, to be refunded to said plaintiff, and that more than six months has elapsed since the date thereof.

That the said amount so paid to said defendant remains due from said defendant to said plaintiff and wholly unpaid.

Wherefore said plaintiff prays judgment against said defendant for the said sum of $12,051.75, with interest at the rate of 10 per cent. per annum from the said 14th day of August, A. D. 1877, and costs of suit.

SHEEKS & RAWLINS,
Attorneys for Plaintiff.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

Feramorz Little, being first duly sworn, on his oath says that he is and officer of Salt Lake City, the plaintiff in the above-entitled action, to wit, the mayor thereof; that he has heard read the foregoing complaint, knows the contents thereof, and that the same is true of his own knowledge.

FERAMORZ LITTLE.

4 Subscribed and sworn to before me this 26th day of March, A. D. 1878.

[SEAL.] JOHN T. CAINE,
Notary Public.

(Endorsed:) Title of the court and cause. Complaint. Filed March 26th, 1878. C. S. Hill, clerk, by H. G. McMillan, deputy clerk. Issued March 26th, 1878.

Demurrer.

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

SALT LAKE CITY, Plaintiff, *vs.* O. J. HOLLISTER, Defendant.

And now comes the said defendant, by his attorney, Philip T. Van Zile, and demurs to the complaint herein, and for grounds of his demurrer states:

First. That the plaintiff has not legal capacity to sue.

Second. That the complaint does not state sufficient to constitute a cause of action.

PHILIP T. VAN ZILE,
Attorney for Defendant.

Dated Salt Lake City, Utah Territory, August 13th, 1878.

5 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

Philip T. Van Zile, being first duly sworn, says that he is the attorney for the defendant in the above-entitled cause, and that as such attorney and for and on behalf of said defendant he makes this affidavit.

And deponent further says that the demurrer herein is not interposed for delay merely.

PHILIP T. VAN ZILE.

Subscribed and sworn to before me this 13th day of August, 1878.
C. S. HILL, *Clerk.*

(Endorsed:) 3502.

SALT LAKE CITY, Plaintiff, *vs.* O. J. HOLLISTER, Defendant.

We hereby accept due personal service of a copy of the within, and do stipulate that the judgment heretofore entered may be set aside.

SHEEKS & RAWLINS,
Attorneys for Plaintiff.

Dated August 14th, 1878.

[Endorsed:] Filed August 14th, 1878. C. S. Hill, clerk. By H. G. McMillan, deputy clerk. Philip T. Van Zile, attorney for defendant.

6 In the Third District Court of Utah Territory.

SALT LAKE CITY *vs.* O. J. HOLLISTER.

The demurrer to the complaint herein having been submitted by the attorneys for the parties hereto, and the court now fully advised,

orders that said demurrer be, and the same is hereby, overruled, and defendant be, and is hereby, allowed twenty days from this date to file answer herein.

M. SCHAEFFER, *Judge.*

November 23d, 1878.

Defendant's Answer.

In the District Court of the Third Judicial District of Utah, County of Salt Lake.

SALT LAKE CITY, Plaintiff, *vs.* O. J. HOLLISTER, Defendant.

Now comes the defendant in the above-entitled cause, O. J. Hollister, and for answer to the plaintiff's complaint admits that the plaintiff is a public municipal corporation created and organized under and by virtue of the laws of the Territory of Utah, and that it has continued to be such a corporation since its organization in February, 1850, and that the defendant was at the time mentioned and as alleged in plaintiff's complaint, and still is, the acting
7 United States collector of internal revenue for the district of Utah.

Defendant admits that in June, A. D. 1876, the United States Commissioner of Internal Revenue set down to and assessed against the plaintiff a gallon tax of ten thousand seven hundred and sixty dollars upon spirits distilled by said plaintiff at various times between the 2d day of March, A. D. 1867, and the 26th day of August, A. D. 1868, and not deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but denies that said gallon tax was illegally or erroneously set down to or assessed against the plaintiff by said Commissioner of Internal Revenue, and avers that the plaintiff, during all the time for which said assessment was made, was actually engaged in distilling, producing, and dealing in, as distiller, said spirits so assessed, and said assessment of said gallon tax was made upon distilled spirits actually produced by the plaintiff, and upon which plaintiff had not paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but taken from said distillery by the plaintiff, after having been produced and distilled as aforesaid, and sold by said plaintiff, and the proceeds of said sale turned into the treasury of the plaintiff.

Said plaintiff, during all the time it operated said distillery, and especially from said 2d day of March, 1867, to said 26th day of August, 1868, was distilling and producing spirits as aforesaid and receiving and appropriating the benefit arising therefrom.

Defendant further alleges that the plaintiff, during the time mentioned in plaintiff's complaint, regularly reported and paid to the collector of internal revenue of the United States the gallon tax due upon a quantity of spirits distilled and produced by plaintiff, but that plaintiff neglected to report all of the spirits it actually produced and distilled and for and upon which the said gallon tax was

due and owing to the United States, and that the tax so as-
8 sessed as aforesaid is the tax due upon the spirits produced and distilled in excess of the amount so reported by said plaintiff, and upon which no tax was ever assessed and collected up to the time of the payment mentioned in plaintiff's complaint and hereinafter stated.

Defendant, answering, admits that the list containing the said gallon tax assessed by the Commissioner of Internal Revenue of the United States was placed in the hands of this defendant as collector of internal revenue.

And defendant alleges that said plaintiff having engaged in the business of distilling and producing spirits as aforesaid, and said tax having been assessed by the Commissioner of Internal Revenue as aforesaid and placed in the hands of the defendant, as collector of internal revenue, for collection, it became and was his duty as such collector to collect said tax.

Defendant denies that he knew that said gallon tax, so assessed as aforesaid, was erroneous and illegal, and avers that said tax was legal and correct and was assessed and collected because plaintiff was liable to said tax.

Defendant admits that he did threaten to seize and sell the property of plaintiff to pay said tax, as alleged by plaintiff, and that the plaintiff on the 14th day of August, 1877, paid the defendant the amount of the gallon tax, with interest which had accrued thereon from the date of said assessment, but for what reason plaintiff paid defendant said gallon tax defendant is not advised, and upon that subject has no knowledge, information, or belief, and therefore cannot answer.

And having answered the plaintiff's complaint said defendant prays to be hence dismissed with his judgment for costs.

PHILIP T. VAN ZILE,
Attorney for Defendant.

9 TERRITORY OF UTAH, } ss:
County of Salt Lake. }

Orlando J. Hollister, being duly sworn, on his oath, says as follows: I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge, except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

ORLANDO J. HOLLISTER.

Subscribed and sworn to before me this 11th day of December, A. D. 1882.

JO. W. MUSGRAVE,
Justice of the Peace.

(Endorsed:) Title of the court and cause. Defendant's answer. Filed December 11, 1877. C. S. Hill, clerk.

In the District Court for the Third Judicial District, Territory of Utah, Salt Lake County.

SALT LAKE CITY, Plaintiff, *vs.* O. J. HOLLISTER, Defendant.

Now comes said plaintiff and demurs to said defendant's answer to the complaint in said action for insufficiency in this, that said answer does not state facts sufficient to constitute a defense to said action.

SHEEKS & RAWLINS,
Attorneys for Plaintiff.

10 TERRITORY OF UTAH, } ss:
Salt Lake County. }

J. L. Rawlins, being first duly sworn, upon his oath, says that he is an attorney for the plaintiff in the above-entitled action, and that the foregoing demurrer is not interposed for delay merely.

J. L. RAWLINS.

Subscribed and sworn to before me this 18th day of December, A. D. 1878.

C. S. HILL, *Clerk*,
By H. G. McMILLAN, *Deputy Clerk.*

(Endorsed:) Title of the cause. demurrer to answer. Filed December 18th, 1878. C. S. Hill, clerk, by H. G. McMillan, deputy clerk. Sheeks & Rawlins, attorneys for plaintiff.

In the Third District Court of Utah Territory.

SALT LAKE CITY *vs.* O. J. HOLLISTER.

Demurrer of plaintiff to the answer herein argued by Sheeks & Rawlins, attorneys for plaintiff, and hearing of further arguments continued until the convenience of the court.

JOHN A. HUNTER,
Judge.

October 7, 1879.

11 SALT LAKE CITY *vs.* O. J. HOLLISTER.

Argument upon the demurrer to the answer is resumed by J. L. Rawlins for plaintiff and by P. T. Van Zile for the defendant, and the same is submitted and taken under advisement by the court.

JOHN A. HUNTER, *Judge.*

October 21, 1879.

In the Third District Court of Utah Territory.

SALT LAKE CITY *vs.* O. J. HOLLISTER.

The demurrer of plaintiff to the answer of defendant having been heretofore argued and submitted to the court, and the court having taken the same under advisement, and being now fully advised thereupon, and it appearing to the court that said demurrer ought to be overruled, it is ordered that said demurrer be, and the same is,

hereby overruled, to which ruling and order plaintiff by its attorney duly excepted, and plaintiff's attorneys give notice of intention to appeal from said order.

JOHN A. HUNTER, *Judge.*

May 8, 1882.

12 In the Third District Court of Utah Territory.

SALT LAKE CITY *vs.* O. J. HOLLISTER.

Sheeks & Rawlins enter an appearance for the plaintiff herein. The court having overruled the demurrer to the answer, and the plaintiff by its attorneys standing upon said demurrer, it is now ordered by the court that judgment be entered herein in favor of defendant and against plaintiff, adjudging that plaintiff take nothing by its said suit and that the complaint be dismissed, and that defendant recover of plaintiff his costs incurred on this behalf, taxed at $——, to which ruling and order plaintiff duly excepted.

JOHN A. HUNTER, *Judge.*

May 12, 1882.

TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

In the District Court, Third Judicial District.

SALT LAKE CITY, Plaintiff, *vs.* O. J. HOLLISTER, Defendant.

In this action the demurrer of the plaintiff to the answer of the defendant having been overruled by the court, and the plaintiff electing to stand by its said demurrer and excepting to the ruling and order of the court and giving notice of its intention to appeal from said ruling, now, on motion of counsel for defendant for judg-
13 ment, it is ordered, adjudged, and decreed by the court that plaintiff take nothing by its said suit, and that the complaint be dismissed; and further ordered and adjudged that said defendant recover of plaintiff his costs on this behalf herein expended and taxed at the sum of $——.

Judgment entered May 12th, 1882.

(Endorsed:) Title of court and cause. Filed May 12th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

In the District Court of the Third Judicial District, Territory of Utah, Salt Lake County.

SALT LAKE CITY, Plaintiff,
vs.
ORLANDER J. HOLLISTER, Defendant.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of Utah Territy from the judgment therein made and entered in said district court on the 12th day of May, A. D. 1882, in favor of said defendant and against said plaintiff and from the whole of said judgment.

SHEEKS & RAWLINS,
Attorneys for Plaintiff.

To said defendant and P. T. Van Zile, his attorney.
Dated May 13th, 1882.

(Endorsed:) Title of court and cause. Notice of appeal.
14 Received copy of within this 13th day of May, A. D. 1882.
P. T. Van Zile, attorney for defendant.

Filed May 13th, 1882.

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN, *Deputy Clerk.*

In the District Court of the Third Judicial District of Utah Territory.

SALT LAKE CITY, Plaintiff,
vs.
ORLANDO J. HOLLISTER, Defendant.

Whereas the plaintiff in the above-entitled action is about to appeal to the supreme court of Utah Territory from a judgment entered against plaintiff in said action in the said district court in favor of the defendant in said action on the 12th day of May, A. D. 1882, and against the plaintiff, adjudging that plaintiff take nothing by its action and for —— costs: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Wm. Jennings, resident of Salt Lake county, by occupation ———, and Jessie W. Fox, resident of Salt Lake county, by occupation civil engineer, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all costs and damages which may be awarded against it on the appeal not exceeding two hundred dollars, to the payment of which amount we acknowledge ourselves jointly and severally bound.

WM. JENNINGS.
JESSIE W. FOX.

15 TERRITORY OF UTAH, } *ss:*
Salt Lake County, }

William Jennings and Jessie W. Fox, being first duly sworn, on his oath saith, each for himself, that he is a resident freeholder in said Salt Lake county, and that he is worth the sum of two hundred dollars over and above his liabilities, and exclusive of property exempt from execution under the laws of Utah Territory.

WILLIAM JENNINGS,
JESSIE W. FOX.

Subscribed and sworn to before me this 15th day of May, A. D. 1882.

[SEAL.] JOHN T. CAINE,
Notary Public.

(Endorsed:) Title. Undertaking on appeal. Filed May 17th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

16 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, O. J. Averill, clerk of the third judicial district court of Utah

Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint; demurrer to complaint; order overruling demurrer to complaint, and allowing time to answer; answer; demurrer to answer; journal entries on submission of demurrer to answer, October 7th and 21st, 1879; order overruling demurrer to answer, etc.; order for judgment; judgment made and entered; notice of appeal and undertaking on appeal in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 17th day of May, A. D. 1882.

[SEAL.] O. J. AVERILL, *Clerk*,
By H. G. McMILLAN, *Deputy Clerk*.

17 In Supreme Court.

THURSDAY, *July* 13*th*, A. D. 1882.

* * * * *

SALT LAKE CITY, Appellant,
vs.
O. J. HOLLISTER, Respondent. } From 3d Dist.

This cause coming on regularly for hearing was argued by Mr. Rawlins for appellant, and Mr. Van Zile for respondent, submitted, and taken under advisement.

MONDAY, *November* 27*th*, A. D. 1882.

* * * * *

SALT LAKE CITY, Appellant,
vs.
O. J. HOLLISTER, Respondent. } From 3d Dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed, and that respondent have, and recover of and from appellant —— dollars costs.

18 On application of counsel of respondent, ordered that the amount of a supersedeas bond on error to the U. S. Supreme Court be and is fixed at $250.00.

THURSDAY, *January* 18*th*, A. D. 1883.

* * * * *

SALT LAKE CITY, Appellant,
vs.
O. J. HOLLISTER, Respondent. } From 3d Dist.

In this cause, appellant, by its counsel, prays the allowance of an appeal from the judgment heretofore entered by this court to the Supreme Court of the United States, and thereupon said appeal is allowed, and the amount of a bond to be given thereon fixed at $250.00.

19 (*Copy of Opinion.*)

Supreme Court, Territory of Utah.

SALT LAKE CITY, Appellant, *vs.* O. J. HOLLISTER, Respondent.

The complaint alleges that the plaintiff is a municipality, incorporated by a public act of the Territorial Legislature in 1850, and since then has continuously existed as such.

The defendant is the United States collector of internal revenue for the district of Utah Territory. That in June, 1876, the United States Commissioner of Internal Revenue erroneously set down and assessed against the plaintiff a special tax of $10,760 upon spirits alleged to have been distilled by the plaintiff between the 2d day of March, A. D. 1867, and the 26th day of August, 1878, and not deposited in bonded warehouse of the United States as required by law. That said tax list was placed in the hands of the defendant for collection, who demanded of the plaintiff the payment of said tax, and threatened that, unless the same was paid, he would seize
20 upon and sell at public auction sufficient of the property of the plaintiffs to pay said special tax, with interest and penalty. That on the 14th day of August, 1877, while the defendant so threatened and was about to seize upon and sell the property as aforesaid, the plaintiff, protesting against payment of said tax or claim of defendant, notified the defendant that suit would be brought against him to recover the same, and, that the plaintiff might not be dispossessed of its property by the defendant, paid to the defendant the amount of said tax claimed by him, amounting with interest thereon to $12.051.75; that the plaintiff appealed to the Commissioner of Internal Revenue, praying that the tax be abated; that the sum so paid to defendant by plaintiff be refunded. That the commissioner has failed to render any decision on the appeal and prayer of the plaintiff, or to cause said sum of money, or any part thereof, to be refunded or restored to the plaintiff, and prays judgment
21 for the amount so paid to the defendant with interest thereon.

The answer admits the municipal character of the plaintiff, the setting down and assessing a tax against the plaintiff upon spirits distilled by the plaintiff during the time, and not deposited in bonded warehouse of the United States, as alleged and set forth in the complaint, and alleges that a list containing the said gallon tax, assessed by the Commissioner of Internal Revenue of the United States, was placed in the hands of the defendant for collection, and avers that it thereby became and was his duty to collect the same, denies that the tax was illegally or erroneously set down or assessed against the plaintiff by the Commissioner, and avers that the plaintiff during all the time between March 2d, 1867, and the 26th day of August, 1878, was actually engaged in distilling, producing and dealing in, as a distiller, the spirits so assessed as aforesaid, and received and appropriated the benefit arising therefrom.

That the assessment of the gallon tax was made upon dis-
22 tilled spirits actually produced and distilled by the plaintiff, and upon which there had not been paid the gallon tax re-

quired by law, said spirits not having been deposited in bonded warehouse of the United States by plaintiff, as required by law, but taken from said distillery by the plaintiff and sold, and the proceeds thereof put into its treasury.

The defendant further answering says: "That the plaintiff, during the time mentioned in plaintiff's complaint, regularly reported and paid to the collector of internal revenue of the United States the gallon tax due upon a quantity of spirits distilled and produced by plaintiff, but neglected to report all of the spirits it actually produced and distilled, and for and upon which the said gallon tax was due and owing to the United States, and that the tax so assessed, as aforesaid, is the tax upon the spirits produced and distilled in excess of the amount so reported by plaintiff, and upon which no tax
23 was ever assessed or collected to the time of the payment mentioned in plaintiff's complaint and defendant's answer," admits that defendant did threaten to seize and sell the property of plaintiffs to pay said tax, and that the plaintiff paid the defendant the amount of said tax with interest, but avers that he has no knowledge, information, or belief [that] for that reason plaintiff paid the same.

To this answer plaintiff demurred, alleging as ground of demurrer "that said answer does not state facts sufficient to constitute a defence to said action."

The demurrer was overruled by the district court, and the plaintiff electing to stand upon the demurrer, judge[ment] was rendered for the defendant, from which judgment plaintiff appealed to this court.

Counsel for plaintiff claim- that a municipal corporation is incapable of acting, except within its corporated powers and by its authorized agents or officers. Therefore the averment that a city has done a certain act involves the assertion of two things.
24 First. That it had the power under its charter to do it; and, second, that it has exercised such power. Unless the former of these be true, the latter is impossible. That the business of distilling or manufacturing spirits has ever been wholly foreign to the objects of the plaintiff corporation, and entirely outside of the scope of its corporated powers, as defined in its charter. That taking money from the city treasury, and with it setting up and operating a distillery in behalf of the city, falsely reporting the city as a distiller, taking the money of the city to pay the illegal tax upon distilled spirits, selling spirits thus distilled and paying the money received therefor into the city treasury, are all acts of persons without authority, and the money used for the purpose of distilling spirits is a misappropriation of city funds; that the charter of the city shields its inhabitants from the consequences of such acts.

As a general rule it may be said that a municipal corpora-
25 tion cannot, by its agents, officers or city council, bind itself by any contract outside of the scope of its powers, or entirely foreign to the purposes of the corporation; that unauthorized contracts are void, and in actions thereon the corporation may success-

fully interpose the plea of *ultra vires*. Dillon on Mun. Corp. 3d, Ed. S., 457.

The pleadings in this case show neither a contract between the plaintiff and the defendant nor between the city and any party under whom the defendant claims; but they do allege that from March 2d, 1867, to August 26th, 1878, the city was engaged in the business of distilling spirits; that for a part of the spirits thus distilled she made regular reports to and paid to the collector of internal revenue the gallon duties or tax due thereon; that the balance were not reported nor deposited in [a] bonded warehouse of the United States, nor the duties or taxes thereon paid; that in the month of August, 1878, there was due to the United States the sum of $12,057.75, as the unpaid duties and taxes and interest thereon, upon the spirits
26 so distilled and not deposited in [a] bonded warehouse of the United States, the proceeds of the sales of which had been paid into the city treasury and appropriated by the city; and for the taxes upon that part of the spirits upon which no taxes had been paid the defendant was about to distrain the goods of the plaintiff, when it paid the amount of duties or taxes claimed, for the return and recovery of which from the defendant this action is brought. There is no claim or pretence that all the acts pertaining to the production or distillation of the spirits, the sale or disposal of the same without depositing them in [a] bonded warehouse, paying the proceeds of the sales thereof into the city treasury, and all business relating in any way to the same were not done or directed by the agents, officers, servants, or employees of the city with her funds and in her name and interests.

Upon the admissions made by the demurrer the questions before us are:

1st. Was the city liable to the United States for the amount
27 of the duties upon the spirits thus produced with her funds, by her officers and legally-constituted agents, acting for and in her name, and by them sold and disposed of without paying the duties thereon, and the proceeds thereof paid to, received, and appropriated by the city, although all such acts were unauthorized by her charter, and a part of them in violation of acts of Congress?

2d. Can she recover the money or any part thereof paid by her to the defendant under the protest and circumstances set forth in the complaint and answer?

Legal principles, other than *ultra vires* of the plaintiff's corporation, are involved, and form an important element in this action. When these spirits came into existence the law created a lien upon them which attached and became an incumbrance thereon, and the United States had an interest in them to the extent of the lien, which was a valid existing legal claim. 13th U. S. St., p. 243–472; Burroughs on Taxation, 620.

28 It was the duty of the assessor or his assistant, upon obtaining knowledge that the duties upon these spirits had not been paid, and that they had been removed from the place where they were distilled, and not deposited in bonded warehouse, to assess a gallon tax against the distiller thereof equal in amount to the

duties and lien attaching thereto at time of distillation, and certify the same to the collector, who was required immediately to demand payment of such tax, and upon refusal or neglect of payment by the distiller to collect the same by distraint. 14 U. S. St., p. 480, 481.

The sale and transfer of these spirits, so long before knowledge thereof was had by the assessor or his assistant, makes it morally certain that they were beyond the recognition or discovery of the revenue officers, and therefore the lien upon them became (if they could be presumed to be in existence) inoperative and of no
29 effect as a means of revenue.

By receiving the proceeds of the sales of these spirits into her treasury, the city became possessed of a large sum of money, the amount of the lien, which was justly due to the United States, and to which she had no legal or moral right; and money so received and appropriated by a municipal corporation is subject to the demand of its legal or equitable owner, by suit to recover it, to the same extent as if held by a private corporation or natural person. This liability arises not from any contract entered into or express promise made by the city, but from the general obligation to do justice, which is equally upon all persons, whether natural or artificial, for the fulfilling of which the law implies a promise, which may be enforced by a suit at law. The fact that the provisions of the city charter do not authorize the acts by means
30 of which she received the money does not enable her to successfully plead *ultra vires*, nor to withhold from the United States the fruits of these unauthorized, and in part fraudulent, transactions. East St. Louis *vs.* East St. Louis Gas Light & Coke Company, 98 Ill., 415; Grogan *vs.* San Francisco, 18 Cal., 590; Argenti *vs.* San Francisco, 16 Cal., 255; Thomas *vs.* Port Huron, 27 Mich.; opinion of Cooley, J., 323; Louisiana *vs.* Wood, 102 U. S., 294; United States *vs.* State Bank, 96 U. S., 30.

The liability of the city as a distiller is a question we [do] not necessarily discuss, as the foregoing reasons and authorities are, in our opinion, conclusive. But it may not be inappropriate to add, that the power of taxation is a part of the government, incident to, and coextensive with, its sovereignty; every kind of property is subject to this power. Cooley on Taxation, p-. 1, 2–4. Because these distilled spirits were produced by means not authorized by law,
31 they were none the less property, subject to the duties and lien imposed by acts of Congress. Although they were certainly not property of a mun-cipal character, necessary for conducting the public affairs of the municipality, yet if they belonged to the city they were, so to speak, private property, owned by the city in a commercial sense, for the sole purpose of gain or profit; and it is by no means clear that the city was not liable to the tax set down and assessed against her, when it was discovered that the original duties were withheld and the spirits removed from the place of distillation to a place other than a bonded warehouse of the United States. United States *vs.* Railroad Company, 17 Wall., 322–332, 3.

If, upon refusing to pay the original duties and lien and the removal of the spirits from the place of distillation to a place other than [a] bonded warehouse, the city did not become liable for the amount of the gallon tax when assessed, she was and did
32 become so from the time the proceeds thereof were received and appropriated by her.

We are all therefore of the opinion that the payment into the city treasury and the subsequent appropriation of the money that was due to the United States as duties upon these distilled spirits, upon which the United States had a lien, was a wrongful act as against the United States, and the appropriation by the city of such money was a wrongful use thereof, and that the amount having been paid by her to the plaintiff, although under protest, cannot be recovered back in this action.

The judgment of the district court is affirmed.

Stephen P. Twiss, associate justice, Hunter, C. J., & Emerson, A. J., concur.

Endorsed: Filed February 8th, 1883. E. T. Sprague, clerk of Sup. Ct.

33 Know all men by these present- that we, Henry Dinwoody, of Salt Lake City, merchant, and J. L. Rawlins, of the same place, attorney, are held and firmly bound unto Orlando J. Hollister in the full and just sum of two hundred and fifty dollars, to be paid to the said Orlando J. Hollister, his certain attorney, executors, administrators, heirs, or assignees, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these present-.

Sealed with our seals and dated this 22d day of January, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at a term of the supreme court of Utah Territory, on the 27th day of November, A. D. 1872, in a suit depending between Salt Lake City, appellant, and Orlando J. Hollister, respondent, judgment was rendered against the said appellant and in favor of the said respondent, and the said appellant having obtained the allowance of an appeal from said supreme court of Utah Territory to the Supreme Court of the United States to reverse the said
34 judgement in the afor-said suit, and a citation directed to the said Orlando J. Hollister citing [and] admonishing to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the obligation is such that if the said Salt Lake City shall prosecute the said appeal to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void, else to remain in full force and virtue.

HENRY DINWOODY. [SEAL.]
J. L. RAWLINS. [SEAL.]

Sealed and delivered in the presence of—
GEO. D. KEATON.

Approved by—

JOHN A. HUNTER,
Chief Justice, Supreme Court of Utah.

[Endo.sed:] Salt Lake City *vs.* Orlando J. Hollister. Bond. (Copy.) Filed Jan'y 22d, 1883. E. T. Sprague, clerk.

35 The United States of America to Orlando J. Hollister, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to and to answer an appeal in an action in which Salt Lake City is appellant and you are appellee, to show cause, if any there be, why a judgement of the supreme court of Utah Territory, rendered against said appellant in said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John A. Hunter, chief justice of the supreme court of Utah Territory, this 22nd day of January, A. D. 1883.

JOHN A. HUNTER,
Chief Justice, &c.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

On this 22nd day of January, A. D. 1883, personally appeared J. L. Rawlins, before me, the subscriber, and makes oath that
36 he delivered a true copy of the within citation to Orlando J. Hollister personally, on the 22nd day of January, A. D. 1883.

J. L. RAWLINS.

Sworn to & subscribed before me [the] day & year last aforesaid.
JOHN A. HUNTER,
Chief Justice of Utah.

[Endorsed:] Salt Lake City *vs.* O. J. Hollister. Citation, (original.) Filed January 22d, 1883. E. T. Sprague, clerk.

37 TERRITORY OF UTAH, *County of Salt Lake:*

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed in the cause of Salt Lake City, appellant, *vs.* O. J. Hollister, respondent, return, annexed hereto, a transcript of the record and proceedings, bond on appeal, and opinion in and of said court in said cause and original citation on such appeal to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, bond, and opinion is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of Utah Territory this 9th day of June, A. D. 1883, at Salt Lake City.

[United States of America. Territory of Utah. Supreme Court.]

E. T. SPRAGUE,
Clerk Supreme Court.

Endorsed on cover: Utah Territory. Supreme court. No. 235. Salt Lake City, appellant, *vs.* O. J. Hollister, collector of internal revenue. Filed 19 June, 1883.

118-256

Office Supreme Court U. S.
FILED.
APR 5 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

October Term, 1885.

SALT LAKE CITY, *Appellant,*

vs.

O. J. HOLLISTER, Collector of Internal Revenue, *Appellee.*

No. 235.

Appeal from Supreme Court of Utah.

BRIEF FOR APPELLANT.

FRANKLIN S. RICHARDS AND
SHEEKS & RAWLINS,
For Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

SALT LAKE CITY,
Appellant.
vs.
O. J. HOLLISTER,
Collector of Internal Revenue,
Appellee.

No. 235.

Brief for Appellant.

STATEMENT.

This action was brought by the appellant against the appellee, in the District Court for the Third Judicial District of Utah Territory, to recover $12,051.75, and interest thereon from August 14th, 1877, exacted by the respondent, as United States Collector, from the appellant, on account of the alleged distillation of spirits by appellant, between March 2nd, 1867, and August 26th, 1868, and which spirits were claimed to have been removed by it without being deposited in the bonded warehouse of the United States, as required by law. The complaint is on page 1 of the Record.

The appellee demurred to the complaint, and the demurrer was overruled. (Record, pp. 3 and 4.) An answer was afterwards filed, (Record, pp. 4 and 5,) and the appellant demurred to the sufficiency of the answer. This demurrer was overruled by the Court, (Record, p. 6,) and final judgment was rendered in favor of the appellee, dismissing the complaint at appellant's cost. (Record, p. 7.) From this judgment an appeal was taken to the Supreme Court of Utah Territory, where the judgment of the lower court was affirmed, (Record, p. 9,) and the case was then appealed to this court. (Record, pp. 14 and 15.)

It is difficult to specify errors in a case like this, further than the general statement that there was error in holding the answer sufficient and in overruling the demurrer to it.

The following sections of the charter of Salt Lake City contain all its charter powers which are in any way applicable to this case.

"SEC. 20. The City Council shall have the management and control of the finances and property, real, personal and mixed, belonging to the corporation."

The City Council has power:

"SEC. 23. To regulate the selling or giving away of any ardent spirits or other intoxicating liquors by any storekeeper, grocer or trader, to be drunk in any shop, store, grocery, outhouse, yard, garden or other place within the city, except by persons or at places duly licensed; to forbid the selling or giving away of ardent spirits or other intoxicating liquors to any child, apprentice or servant, without the consent of his or her parent, guardian, master or mistress, or to any Indian."

"SEC. 24. To license, regulate or restrain the manufacturers, sellers or venders of spirituous and fermented liquors, tavernkeepers, dram or tippling shop keepers, grocers and keepers of ordinaries, boarding, victualing or coffee houses, restaurants, saloons or other houses or places for the selling or giving away of wines or other liquors, whether ardent, vinous or fermented."

"SEC. 31. To direct the location and management of, and regulate breweries and tanneries; and to direct the location,

management and construction of, and restrain or prohibit within the city, distilleries, slaughtering establishments and establishments for steaming and rendering lard, oil, tallow, offal and such other substances as can or may be rendered; and all establishments or places where nauseous, offensive or unwholesome business may be carried on."

"SEC. 42. To license, tax and regulate merchants and retailers, auctioneers, distillers, brewers, brokers, pawnbrokers and money changers, and to impose duties upon the sale of goods at auction."

"SEC. 52. To regulate the inspection of whisky and other liquors to be sold in barrels, hogsheads or other vessels."

"SEC. 60. To borrow money on the credit of the city: Provided, that the interest on the aggregate of all the sums borrowed and outstanding, shall not exceed one-fourth of the city revenue arising from taxes assessed within the corporation during the preceding year."

"SEC. 61. The City Council shall have power to make, publish, ordain, amend and repeal all such ordinances, by-laws, or police regulations, not contrary to the Constitution of the United States and the laws of this Territory, for the good government and order of the city, as may be necessary and expedient to carry into effect the powers vested in the City Council or any officer of said city by this act; and enforce observance of all rules, ordinances, resolutions, by-laws and police and other regulations, made in pursuance of this act, by penalties not exceeding one hundred dollars for any offense against the same, or imprisonment not exceeding six months or both."

BRIEF AND ARGUMENT.

The question of the sufficiency of the answer to constitute a defense to the cause of action stated in the complaint, raised by the demurrer to the answer and overruled by the District Court, is the only one for the consideration of this court. The answer admits all the allegations of fact contained in the complaint, expressly admitting that the plaintiff has continuously existed as a public municipal corporation since 1850, created and organized by the laws of Utah.

To summarize the answer, in addition, it alleges

1st.—That the city engaged in the business of distilling spirits, and distilled the spirits taxed.

2d.—That it removed the spirits without depositing them in the bonded warehouse and paying the tax.

3d.—That the proceeds of the sale of the spirits, and the benefits of this business, were received and appropriated by the city.

4th.—That it reported and paid the tax regularly upon a quantity of spirits, but not upon all. (Record pp. 4 & 5.)

It is first important to ascertain how much of the answer is purely matters of fact and therefore admitted by the demurrer, and how much of it is matters of law which the demurrer challenges.

A municipal corporation, although regarded as a legal entity, is not a physical entity, and is incapable of acting, except within its corporate powers and by its authorized officers or agents. Therefore, the averment that a city has done a certain act involves the assertion of two things: First—That it had the power under its charter to do that act, and, Second—That it has exercised that power. Unless the former of these be true, the latter is impossible. The question of the existence of the power, being a matter of public law, will be determined by the court, not by evidence, but by reference to its own judicial knowledge. That question in this case is not precluded by the demurrer.

United States *vs.* Van Auken, 6 Otto, 369.
Branham *et al.*, *vs.* Mayor and Common Council of San Jose *et al.*, 24 Cal., 585, 602, 604.
People *ex rel* Purdy *vs.* Commissioners, etc., 54 New York, 276, 279.

The charter of Salt Lake City is a public law of which all persons are bound to take notice, and the extent of its

powers, as thereby defined, is within the judicial knowledge of the court.

Compiled Laws of Utah, p. 708, Charter Sec. 83.
1 Dillon Mun. Corp., Sec. 83 and note 4.
1 Wharton's Ev., Secs. 287, 293.
Cooley's Con. Lim., 237. And authorities hereafter cited.

A corporation possesses no power not expressly granted or necessary to carry such powers into effect.

1 Dillon Mun. Corp., Secs. 89, 91, and notes.
Cooley's Con. Lim., 235. 19 Albany, L. J., 455.

The business of distilling or manufacturing spirits has ever been wholly foreign to the objects of the corporation of this city, and entirely outside of the scope of its corporate powers, as defined in its charter.

This cannot be disputed, and was formally admitted by counsel for respondent in the court below, namely: *That the distillation of spirits is, and always has been, strictly ultra vires of the plaintiff corporation.* While admitting this, counsel disputed what seems to be *universally* regarded by the courts and text writers as its necessary legal consequence.

Taxing statutes are to be strictly construed in favor of the citizen.

Cooley on taxation, 200 *et seq.*

And a delinquent tax upon spirits removed without having been deposited in the bonded warehouse, can be assessed by the commissioner only upon the *distiller.*

Revised Statutes U. S., p. 630, Sec. 3253.

This the city could not be.

It was not only essential to the validity of this assessment against the city that it was the distiller of the spirits, but also

that it removed the spirits without depositing them in the bonded warehouse.

The latter it not only had no power to do under its charter, but by law was expressly prohibited from doing under the severest penal consequences, (Revised Statutes U. S., p. 641, Sec. 3296,) namely: double the tax imposed, a fine of not less than $200 nor more than $5,000, and imprisonment which may be three years. If, in this case, the city is liable to the tax, it has incurred these penalties, and the present inhabitants which constitute the city, differing largely from its population of fifteen years ago, must endure the burden of the tax, fines and imprisonment, although in no degree responsible for the acts out of which they are claimed to arise.

It ought to require no argument that the charter of the city shields its inhabitants from any such consequences. Some persons, wholly without authority, assumed to set up and operate a distillery in behalf of the city. Without authority, they took the money from the city treasury and misappropriated it for this purpose. Without authority, they distilled spirits and falsely reported the city as the distiller. The revenue officers of the United States, knowing that the city was not and could not be the distiller, because they are bound to know the law, passed the responsible parties and taxed the city. The persons —the real distillers, without any authority, again took the city's money to pay the illegal tax. Without authority, they sold spirits and turned the "proceeds" or "benefits," as the case might be, into the city treasury. What proportion these "benefits" bore to the misappropriations is purely a matter of conjecture. With the presumed knowledge and connivance of the officers of the government, this distillery business has been the occasion of an illegal diversion of at least some of the public funds of the city to objects entirely foreign to its creation. But it has been insisted that from the aggregate of these acts, each separately void as to the city for an entire want of authority

to do it, is derived an estoppel by which the city is precluded from preventing any further misappropriation of its funds, and asserting the truth of the want of power of any one to bind it to the consequences of his unauthorized and unlawful acts pertaining to this business. Counsel below seemed to derive some comfort from the proposition that he whose money is paid to and appropriated by a city without consideration, might recover it in an action of implied assumpsit. This may be well enough in the abstract, but here counsel did not have facts sufficient to put such a case upon the record. It does not appear that the amount exacted was ever paid to the city, nor that whatever was paid was without consideration or was not in lieu of money actually taken from the city; neither is there any pretense that the money was paid by, or belonged to the defendant or the government; nor was the money exacted under any such claim, nor did the procedure accord with it.

Where there has been an irregular or informal exercise of a power conferred upon a municipal corporation, it may be precluded, under some circumstances, from questioning its liability; but that it cannot in any event incur any liability by estoppel, ratification or otherwise, in respect to an act or matter strictly *ultra vires*, or wholly outside its corporate powers, is a proposition firmly established and universally recognized by the authorities.

1 Dillon Mun. Corp., 3d ed., Secs. 89, 457, 458.
2 Dillon Mun. Corp., Secs. 935, 936, 968, 972.
Angell & Ames on Corp., Sec. 256.
Cooley on Torts, 120.
Pearce *vs.* Mad. & Ind. R. R. Co., 21 How, 441, 445.
Thomas *vs.* City of Richmond, 12 Wall, 349, 356-7.
The Mayor *vs.* Ray, 19 Wall, 468, 478.
Township of East Oakland *vs.* Skinner, 94 U. S., 255, 258.
Town of S. Ottawa *vs.* Perkins, *Id.*, 260, 267, 269.

Orleans *vs.* Platt, 99 U. S., 676, 682.
Thomas *vs.* R. R. Co., 101 U. S., 71, 83.
Anthony *vs.* County of Jasper, *Id.*, 693, 696-97.
Allen *vs.* Louisiana, 103 U. S., 80.
Scoville *vs.* Thayer, 105 U. S., 143.
Mayor, etc., of Albany *vs.* Cunliff, 2 Com. (N. Y.), 165, 177.
McDonald *vs.* Mayor, etc., 68 N. Y., 23, 27.
Moore *vs.* Mayor, etc., 73 N. Y., 238, 246, 248.
McCoy *vs.* Briant, 53 Cal., 247.
Austin *vs.* Coggeshall, 12 R. I., 329 S. C.
McPherson *vs.* Foster, 43 Iowa, 48 S. C.
Hood *vs.* The N. Y. and N. H. R. R. Co., 22 Conn., 502.

In respect to municipal or public corporations we have been unable to find any case in conflict with the decisions establishing the foregoing proposition. The proposition is also true as to private corporations, as declared by a great preponderence of authority.

Such is the settled doctrine of this court, as is shown by the cases cited, especially those of Pearce *vs.* Madison & Ind. R. R. Co., Thomas *vs.* Railroad Co., and Scoville *vs.* Thayer, *supra.* In all these cases in respect to private corporations the question of estoppel and ratification was raised and repudiated, the matter being beyond the scope of the corporate powers.

The same rule prevails in England. In Ashbury Railway Carriage & Iron Co., *vs.* Richie, a recent decision of the House of Lords, cited and approved by this court in Thomas *vs.* R. R. Co., *supra.* Richie fully, and at a large expense, built a railroad in Holland for and under a contract with the Ashbury Co. He had fully executed his part of the contract, and the stockholders afterwards did what they could towards ratifying

it. But it was held that the construction of the railway was *ultra vires* of the company, in respect to which it could incur no liability by ratification or otherwise. To the same effect are the decisions of the courts of most of the States. But an opposite view is taken by the courts in New York and Illinois in respect to private corporations, whose powers are not defined by public law. It originated in New York in the case of Bissel *vs.* the Mich. Southern & Northern Ind. R. R. Co., (22 N. Y. 258,) but it was admitted by the Court in that case, that the decision of this court in Pearce *vs.* the Madison & Indianapolis R. R. Co. *supra* was against the position there taken. (22 N. Y. 278.)

As to municipal corporations in that State, the rule is entirely different. In the Mayor of Albany *vs.* Cunliff *supra*, where the city, under the direct supervision of the City Council, assumed, without authority, to build a bridge, received and appropriated to its own use $4,000, for so doing, had the management of it and collected tolls, but constructed it so negligently that it fell and injured the plaintiff. Under these circumstances, it was claimed that the city was estopped from denying its liability. But the Court of Appeals held there could be no estoppel where there was an entire want of corporate power. The same doctrine is announced in the case cited from 73 N. Y. Reports, *supra*.

So in Bradley *vs.* Ballard, (55 Ills., 413 S. C.,) where in respect to a private corporation, it was held by the Supreme Court of Illinois that a stockholder might be precluded from raising the question of power against an innocent third party. The Court expressly limited the doctrine to private corporations, saying: "But municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers cannot be made binding upon the taxpayers from the presumed assent of the latter."

The general tenor of the doctrine and language of this court, as used in the numerous cases cited, is as strong as possible in respect to the non-liability, under any circumstances, of a municipal corporation where the acts out of which the liability is supposed to arise are wholly beyond their corporate powers.

So in the Town of South Ottawa *vs.* Perkins, (94 U. S. 269,) where plaintiff claimed to be a *bona fide* holder, for value, without notice, of bonds of the town issued without authority. This court said: "Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them."

Again, in Oakland *vs.* Skinner, *Id.*, 258, it is said: "We have held that there can be no *bona fide* holding when the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a *bona fide* holding."

In Allen *vs.* Louisiana, 103 U. S., *supra*, a railroad company operated their road to a point across the Mississippi River, opposite the town of Louisiana. The legislature, by an unconstitutional statute, upon compliance with certain conditions precedent on the part of the railroad, namely, to extend its road across the river into the town, and incur certain other expenditures, attempted to authorize the town, by a two-thirds vote of its inhabitants, to subscribe for a certain amount of the stock of the railroad company. All the inhabitants but ten voted in favor of the subscription, and the stock was subscribed. The railroad company fully complied with the conditions on its part, and instalments of interest had been paid on bonds issued to pay the

subscription. The coupons of these bonds on which the suit was brought against the town, had been purchased by plaintiff's intestate for value, before maturity and without notice. But it was held that the transaction being *ultra vires* of the town, plaintiff could not recover.

In Scoville *vs.* Thayer *supra*, it was held by this court that even a private corporation could not be estopped in respect to a matter wholly beyond its corporate powers.

The California authorities cited are equally strong to the same effect.

The doctrine of the cases relied on by the Supreme Court of Utah is not applicable to this case. The city neither received any money or property belonging to the United States. The money for which the spirits were sold, was placed in the city treasury. The specific moneys are not traced or identified.

The remedy of the government was either against the actual distiller or by enforcing its lien against the spirits.

The fact that government has a lien against property for a tax, will not authorize it to collect the tax from any one into whose hands the proceeds of the sale of such property may happen to come. Neither is any part of the money for which such property is sold the money of the government, as the court below seemed to think. If the owner of property on which a tax is due, sells it and gives the money to B, it will hardly be claimed that B thereby becomes legally obliged to pay the tax.

In all the cases cited and relied on by the court below which tend to support its decision, the obligation arose out of a transaction which related to something within the power of the corporation; or the corporation had received something which belonged to the other party. In East St. Louis *vs.* The East St. Louis Gas Light & Coke Co., 98 Ill., 415, the contract

related to lighting the city with gas. The city had power over the subject. Under a contract the gas company had expended money and it was held that the city must pay for what had been done even though the contract was *ultra vires*. The case of Argenti *vs.* City of San Francisco, 16 Cal., 255, was one relating to the improvement of streets which was within the express power of the city. The case of Thomas *vs.* Port Huron, 27 Mich., 323, after holding that certain bonds were issued without authority, and were void, contains a dictum to the effect that if the city had received money of the other party it might be recovered in a proper action. That of course would be denied by no one; and is the substance of the case of Grogan *vs.* San Francisco, 18 Cal., 590. In United States *vs.* State Bank, 96 U. S., 30, this court held that the owner may recover his money from the United States when it has got into the treasury through the fraud of its agent. And in Louisiana *vs.* Wood, 102 U. S., 294, the corporation having borrowed money which it had power to do, it is held that the money could be recovered although the bonds given to evidence the indebtedness were invalid.

None of these cases conflict with the principle which we take to be well settled—that a municipal corporation has no power except that which is given expressly or by implication. And that it is a legal impossibility for one with the powers of Salt Lake City to operate a distillery.

Parkersberg *vs.* Brown, 106 U. S., 487.
Ottawa *vs.* Carey, 108 U. S., 110.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Litchfield *vs.* Ballou, *et al.*, 114 U. S., 190.
Hayes *vs.* Holly Springs, 114 U. S., 120.
Cavanagh *vs.* Boston, 139 Mass., 426.

In view of the law, we therefore submit that the several matters alleged in the answer, taken separately or together,

cannot have the least effect in the way of imposing the liability to the tax in question upon the city, and we confidently await your reversal of the judgment of the lower court.

FRANKLIN S. RICHARDS AND
SHEEKS & RAWLINS,
Attorneys for Appellant.

118-256

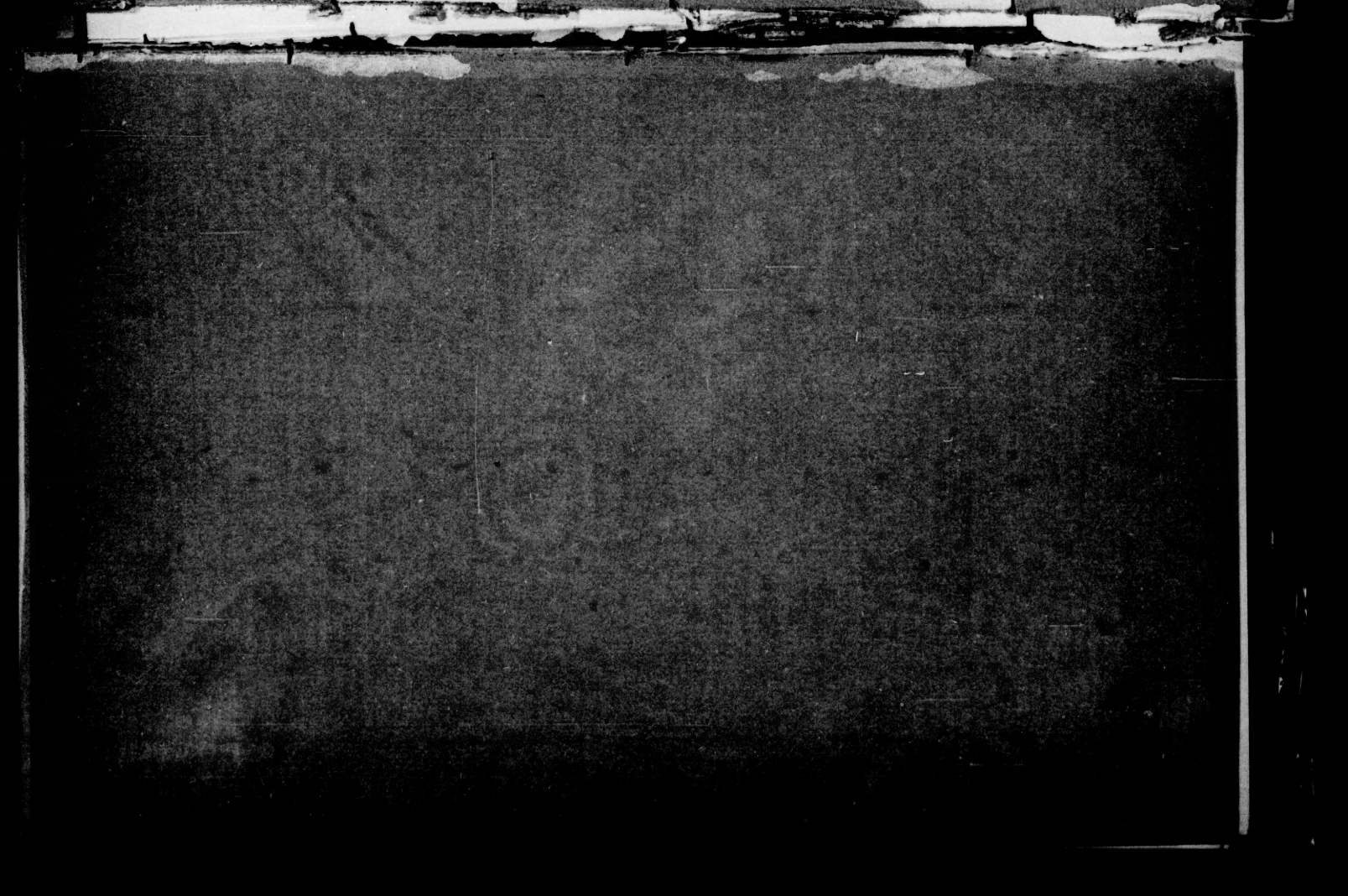
APR 15 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

SALT LAKE CITY, APPELLANT,
vs.
O. J. HOLLISTER, COLLECTOR OF internal revenue.
No. 235.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.



In the Supreme Court of the United States.

OCTOBER TERM, 1885.

SALT LAKE CITY, APPELLANT,
vs.
O. J. HOLLISTER, COLLECTOR OF internal revenue. } No. 235.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

This suit was brought by Salt Lake City against O. J. Hollister in the district court of the third judicial district, Territory of Utah. The object of the suit as shown by the complaint (to be found in the record) was to recover from the defendant the sum of $12,051.75, which was collected from the plaintiff by the defendant under the circumstances set forth in said complaint.

The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, which demurrer was overruled by the court. The defendant, having made answer to the complaint, it was demurred to by the plaintiff as not stating facts sufficient to constitute a defense to the action, which demurrer was overruled by

the court and judgment was rendered for the defendant. An appeal was taken to the Supreme Court of the Territory of Utah, and the judgment of the district court was affirmed. From that judgment an appeal has been taken to this court.

It appears from the answer of the defendant that a tax was assessed against the plaintiff upon certain spirits distilled by the plaintiff and not deposited in a bonded warehouse of the United States; that a list containing the said gallon tax assessed by the Commissioner of Internal Revenue of the United States was placed in the hands of the defendant for collection, and that it became his duty under the law to collect the same.

It appears that the plaintiff, during all the time between March 2, 1867, and the 26th of August, 1878, was actually engaged in distilling, producing, and dealing in, as a distiller, the spirits so assessed as aforesaid, and received and appropriated the benefit arising therefrom. It appears that the assessment of the gallon tax was made upon distilled spirits actually produced and distilled by the plaintiff, and upon which there had not been paid the gallon tax required by law, said spirits not having been deposited in a bonded warehouse of the United States by plaintiff, as required by law, but taken from said distillery by plaintiff and sold, and the proceeds thereof put into its treasury.

It appears further that the plaintiff, during the time mentioned in the plaintiff's complaint, regularly reported and paid to the collector of internal revenue of the United States the gallon tax due upon a quantity of spirits produced and distilled by plaintiff, but neglected to

report all the spirits it actually produced and distilled, and upon which the said gallon tax was due and owing to the United States, and that the tax so assessed is the tax upon the spirits produced and distilled in excess of the amount so reported by plaintiff, and upon which no tax was ever assessed or collected to the time of the payment mentioned in plaintiff's complaint and defendant's answer. This answer having been demurred to, the question presented is whether it states facts sufficient to constitute a defense to the action.

Section 3247 of the Revised Statutes provides that every person that produces distilled spirits shall be regarded as a distiller.

Section 3248 defines what is meant by distilled spirits, and provides that the tax shall attach to this substance as soon as it is in existence as such.

Section 14 of the act entitled "An act to amend existing laws relating to internal revenue and for other purposes," approved March 2, 1867, provides that there shall be levied, collected, and paid on all distilled spirits upon which no tax has been paid according to law a tax of $2 upon each and every proof gallon, to be paid by the distiller, owner, or any person having possession thereof, and every proprietor or possessor of a distillery or distilling apparatus shall be jointly and severally liable for the taxes imposed by law upon the spirits distilled therein; and the tax shall be a lien upon the spirits distilled * * * from the time said spirits are distilled until the said tax shall be paid; provided, that the tax upon any spirits distilled and removed from the place where distilled and not deposited in a bonded warehouse as required by law,

shall at any time, upon knowledge of such fact obtained by the assessor or assistant assessor of the district where such spirits were distilled, be assessed by him upon the distiller of the same and certified or returned to the collector, who shall demand payment of such tax; and upon the neglect or refusal of payment by the distiller shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

It appears that the contention of the plaintiff in the court below was that a municipal corporation is incapable of acting except within its corporate powers, and by its authorized agents or officers, and that the business of distilling or manufacturing spirits has ever been wholly foreign to the objects of the plaintiff corporation and entirely outside of the scope of its corporate powers as defined by its charter. It is undoubtedly true that a municipal corporation has no general authority to exchange promises with other corporations or persons, and that its contracts, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes. It is also true, as to the contracts of corporations, that where the question is one of capacity or authority to contract arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of a contract cannot in an action founded upon it contest its validity. And this rule applies with equal force to all corporations, public or private.

But the question presented here is not one of contract at all. The question is whether Salt Lake City had a

right to put into its treasury, and appropriate to itself, under the fraudulent circumstances disclosed by the record, money which belonged to the United States. In *Marsh* v. *Fulton County* (10 Wall., 676) this court said: "The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the property of others without authority, the law, independent of any statute, will compel restitution or compensation." It is a well-settled principle of the common law that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition. In *Bayne et al., trustees,* v. *United States* (93 U. S., 642) this court decided that an action will lie whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial.

The opinion of the court below is so full, and discusses the only question involved so satisfactorily, that I do not deem it necessary to attempt further discussion here. I submit that the judgment of the supreme court of the Territory of Utah in this case should be affirmed.

Very respectfully,

JOHN GOODE,
Solicitor-General.

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